CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 170/19

In the matter between:

MOZAMANE TEAPSON MASWANGANYI	Applicant
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Second Respondent
SECRETARY FOR DEFENCE	Third Respondent

Neutral citation: *Mozamane Teapson Maswanganyi v Minister of Defence and Military Veterans and Others* [2020] ZACC 4

Coram: Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Mathopo AJ, Theron J, Tshiqi J and Victor AJ

Judgments: Tshiqi J (unanimous)

Heard on: 19 November 2019

Decided on: 20 March 2020

Summary: Termination of employment by the South African National Defence Force — *ex lege* (by operation of law) — pursuant to section 59(1)(d) of the Defence Act 42 of 2002 — effect after conviction and sentence set aside on appeal

Jurisdictional factors to section 59(1)(d) fell away — termination of employment reversed by operation of law — employment never validly terminated

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel, where so employed.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:

“(a) It is declared that the applicant’s service with the South African National Defence Force did not terminate as contemplated in section 59(1)(d) of the Defence Act 42 of 2002 and that he continues to be in the employ of the South African National Defence Force in the same position and capacity he was on 18 July 2014.

(b) The respondents are ordered to pay the applicant’s costs in the High Court, and Supreme Court of Appeal, jointly and severally.”

JUDGMENT

TSHIQI J (Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Mathopo AJ, Theron J, and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal, in terms of which it upheld an appeal by the respondents against an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court had ordered the respondents to reinstate the applicant to his former position at the South African National Defence Force (SANDF) with effect from 18 July 2014, and also his salary and benefits from the said date. At the heart of this application lies the proper interpretation and application of section 59(1)(d) of the Defence Act (Defence Act).[1]

[2] Section 59(1)(d) provides:

> "(1) The service of a member of the Regular Force is terminated
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> . . .
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> (d) if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine or if a sentence involving discharge or dismissal is imposed upon him or her under the Code. . ."

Factual background

[3] The applicant became a permanent member of the SANDF with effect from 1 April 2009. During the course of 2010, he was arrested on a charge of rape. On 18 July 2014, he was convicted and sentenced to life imprisonment. He lodged an

[1] 42 of 2002.

appeal against his conviction and sentence, but was not granted bail pending his appeal and he immediately began serving his sentence.

[4] On 13 February 2015, the applicant's appeal succeeded, and his conviction and sentence were set aside; he was subsequently released from prison. On 16 February 2015, the applicant submitted the court order and warrant of liberation to Adjudant Mashabela at his unit at the SANDF and requested to be reinstated. He was informed to submit an application for his reinstatement.

[5] On 13 March 2015, he submitted an application in the form of an affidavit titled: "Application for Re-Employment," in which, in relevant parts, he stated that he had been wrongfully arrested for rape and was dismissed from work after he was found guilty and sentenced to life imprisonment. He further stated that his conviction and sentence had been set aside and that he was thereby bringing an application to be reinstated. Further correspondence followed, but to no avail as the applicant was not reinstated.

Litigation history

High Court

[6] The applicant launched an application in the High Court for an order for his reinstatement and that of his salary and benefits with effect from 18 July 2014, being the date of termination of his service, alternatively from 13 February 2015, being the date on which his conviction and sentence were set aside. Regarding costs, the applicant prayed for an order for costs on a punitive scale as between attorney and client.

[7] In his founding affidavit, the applicant stated that he was not suspended during his trial or after conviction, as stipulated in section 42(1) of the Military Discipline Supplementary Measures Act[2] (MDSM Act) and that during his

[2] 16 of 1999.

trial he was required to attend a work related course. After his conviction, Sergeant Mdluli from his unit visited him in prison and asked him to sign documents regarding his pension and told him that his services had been terminated. He informed Sergeant Mdluli that he had lodged an appeal against his conviction. The applicant further elaborated that notwithstanding knowledge of his appeal, the respondents terminated his services in terms of section 59(1)(d) of the Defence Act, instead of suspending him pending the conclusion of his appeal as provided for in section 42(1) of the MDSM Act.

[8] In conclusion, the applicant contended that because his imprisonment had been set aside on appeal, the termination of his services in terms of section 59(1)(d) of the Defence Act was unlawful, and that, alternatively, the refusal to reinstate him under the circumstances infringed his section 23 constitutional right to fair labour practices.

[9] The first and second respondents, in their answering affidavit alleged that the applicant had managed to conceal his arrest and criminal trial in that he never informed the Officer Commanding or any Officer responsible of the impending charges against him. The SANDF learnt about the applicant's arrest and trial for the first time after his conviction, when he was sentenced to life imprisonment. The first and second respondents submitted that they do not take any decision regarding a member who is convicted and sentenced for a criminal offence. Instead, the provisions of section 59(1)(d) of the Defence Act automatically kick in. When the applicant was convicted and sentenced, his services were, in terms of section 59(1)(d) of the Defence Act, terminated by the operation of law. After the applicant's conviction had been set aside, he had to follow the prescribed procedure for any person seeking employment and had to state reasons why he should have been re-employed. Regarding section 42 of the MDSM Act, the first respondent submitted that as the applicant was serving a prison sentence, he could not be suspended and that section 42 could thus not be invoked.

[10] The applicant filed a replying affidavit. In response to the allegation from the respondents that he concealed his criminal trial, he stated that the investigating officer in his case, Warrant Officer Chauke, had contacted Captain Maake, the applicant's Assistant Officer Commanding. The latter confirmed that he was informed of the applicant's arrest and the charge against him. In support of this version the applicant attached a letter dated 26 October 2010 from Lieutenant Colonel Nethononda, the Officer Commanding 7 SA Infantry Batallion, addressed to Captain Maake. This letter, which was forwarded by Captain Maake to Warrant Officer Chauke, confirmed the applicant's employment with the SANDF and further that he had been withdrawn from the deployment structure. The applicant attached a copy of an extract from a SAPS dossier relating to the rape case. This extract bears an inscription, allegedly by Warrant Officer Chauke, stating that he had informed Captain Maake about the applicant's arrest and that the latter had informed the former that he had already received a message about the rape charge. It further stated that their office had taken a decision to withdraw the applicant from going to perform six month duties in the Democratic Republic of Congo.

[11] The High Court upheld the arguments advanced by the applicant. From the outset, the High Court pointed out that the distinction between sections 59(1)(d) and 59(3) of the Defence Act and section 42(1) of the MDSM Act is that, in terms of section 42 of the MDSM Act, the service of a member may be suspended while awaiting trial, review or appeal.[3] A further distinction is that section 59(1) of the Defence Act is silent on the powers and discretion of the second respondent regarding possible reinstatement after termination of services, whereas section 59(3) of the Defence Act grants this power and discretion to the second respondent, on good cause shown, to reinstate the said member. Section 42(2) of the MDSM Act, however, directs the second respondent to give notice to the affected member before making a determination in terms thereof.

[3] *Maswanganyi v The Minister of Defence and Military Veterans* 2017 JDR 1348 (GP) (High Court judgment).

[12] Having distinguished the sections in dispute, the High Court held that sections 59(1)(d) and 59(3) of the Defence Act, as well as section 42(1) of the MDSM Act had to be read conjunctively. In this regard, the High Court reasoned that the second respondent had a choice between invoking either section 59(1)(d) or 59(3) of the Defence Act, alternatively, section 42(1) of the MDSM Act. However, the High Court found that the election to invoke section 59(1)(d), and not one of the other two sections, was in itself an administrative decision which was "arbitrary in the circumstances".[4]

[13] According to the High Court, the respondents could not hide behind the fact that section 59(1)(d) is silent on the powers and discretion of the second respondent to reinstate a member. If the second respondent was convinced that the applicant did not report his arrest, then the respondents could have invoked the provisions of section 59(3). Furthermore, after they were informed of the conviction and sentence of the applicant, the respondents ought to have invoked the provisions of section 42(1) of the MDSM Act. In the circumstances, the High Court ordered the applicant's reinstatement to the SANDF and the reinstatement of his salary and benefits, both retrospectively, from the date of his arrest, on 18 July 2014.[5]

[14] Unhappy with this outcome, the respondents filed an application for leave to appeal at the High Court, which application was refused. Aggrieved by this refusal, the respondents then applied for, and were granted leave to appeal against the High Court's judgment by the Supreme Court of Appeal.

Supreme Court of Appeal

[15] From the onset the Supreme Court of Appeal highlighted that the High Court had erred in the manner in which it categorised the nature of the matter before it. The High Court had dealt with the matter as if it was a review application. As the

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[4] Id at para 18.

[5] Id at para 22.

Supreme Court of Appeal stated, the relief sought by the applicant was framed as a *mandamus* (judicial writ or an order a court issues directing a party to do or refrain from doing something).[6] He applied for his reinstatement to the SANDF, with full benefits and for payment of his salary, both with retrospective effect. The Supreme Court of Appeal proceeded to deal with the matter as that seeking a mandatory order.

[16] In a unanimous judgment, the Supreme Court of Appeal held that the argument that section 59(1)(d) of the Defence Act must operate automatically, in a converse factual scenario, namely that, upon the setting aside of the applicant's conviction, reinstatement to the SANDF must also follow automatically, is fatally flawed.[7] In this regard, the Supreme Court of Appeal referred to its decision in *Mamasedi*, where it held that—

> "[r]einstatement does not follow from the setting aside of the decision not to reinstate Mamasedi. He was discharged by operation of law in terms of section 59(3) and, in the absence of a decision by the Chief of the SANDF to reinstate him, he remains dismissed from the SANDF."[8]

[17] Furthermore, the Supreme Court of Appeal held that absent a provision for any reinstatement in section 59(1)(d) of the Defence Act, the applicant remained dismissed by operation of law. The Supreme Court of Appeal reasoned that it is difficult to conceive of an automatic reinstatement following upon, for example, a member who has become unfit for duty in accordance with section 59(1)(e) of the Defence Act, particularly if such a member becomes medically fit for duty.[9] In the premises, the Supreme Court of Appeal found that the High Court erred in finding that section 59(3) of the Defence Act and section 42(1) of the MDSM Act also applied in this case. According to the Supreme Court of Appeal, section 59(1)(d) of the Defence Act was

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[6] *Minister of Defence and Military Veterans v Maswanganyi* 2019 (5) SA 94 (SCA) (Supreme Court of Appeal judgment) at para 1.

[7] Id at para 14.

[8] *Minister of Defence and Military Veterans v Mamasedi* [2017] ZASCA 157; 2018 (2) SA 305 (SCA) (*Mamasedi*) at para 24.

[9] Supreme Court of Appeal judgment above n 6 at para 14.

the only applicable provision. Furthermore, whilst section 59(3) of the Defence Act pertinently makes provision for reinstatement by the Chief of the SANDF, section 59(1) contains no such provision.[10]

[18] The Supreme Court of Appeal remarked that it is striking that the Legislature uses the words "the service of a member . . . is terminated" in section 59(1) of the Defence Act.[11] The meaning of the said words, so the court stated, is—

> "plainly that in the instances listed from section 59(1)(a) up to and including section 59(1)(e), termination follows ex lege. Thus, for present purposes, it means that once the respondent had been sentenced to life imprisonment, his service in the SANDF was terminated by operation of law in terms of section 59(1)(d). No decision was required by any one or more of the appellants to effect that termination. This conclusion is reached by giving the words its plain meaning and considering them against the contextual setting of section 59(1). Thus in the other four instances listed in section 59(1), namely resignation, retirement (or pension), termination of a fixed term contract and medical or psychological unfitness for duty, retirement would follow automatically. It would be an absurdity to, for example, require any one or more of the appellants to take a decision on termination of service where a member has reached retirement age or has elected to go on pension. In the premises, since the respondent's service was automatically terminated by the operation of section 59(1)(d) when he was sentenced to life imprisonment, there was no 'decision' that could be reviewed and set aside."[12]

[19] The Supreme Court of Appeal also pointed out that the "jurisdictional facts for the coming into operation of section 59(1)(d) are that a member of the Regular Force must have been sentenced to a term of imprisonment without the option of a fine by a competent civilian court".[13] The Supreme Court of Appeal found that in these circumstances the respondents were correct in requiring the applicant to apply for re-employment. Furthermore, the Supreme Court of Appeal highlighted that the

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[10] Id.

[11] Id at para 13.

[12] Id.

[13] Id at para 15.

applicant was arrested on 26 October 2010, and his conviction and sentence only followed on 18 July 2014. As a result, the applicant should have advised his superiors of his arrest immediately once it occurred, in that case, section 42(1) of the MDSM Act could then have applied. According to the Supreme Court of Appeal, the belated attempt to invoke section 42(1) of the MDSM Act, after the fact, was misconceived.[14]

[20] The Supreme Court of Appeal held that the applicant's reliance on section 42 of the MDSM Act was in any event at variance with his pleaded case. For this finding the Supreme Court of Appeal relied on the applicant's founding affidavit where, in setting out the narrative, the applicant stated:

> "I confirm that I was not suspended during my trial or after my conviction, as stipulated in section 42(1) of the MDSM [Act]. In fact I was called up to attend a course in the midst of my trial."[15]

In this Court

Issues

[21] The following issues arise for consideration by this Court:

(a) Whether the matter engages our jurisdiction and the application for leave to appeal should be granted; and

(b) Whether on a proper interpretation of section 59(1)(d) of the Defence Act, the applicant's service with SANDF was terminated *ex lege* (by operation of law) once he was sentenced by the trial court, irrespective of his election to lodge an appeal against the conviction and sentence.

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[14] Id.

[15] Id at para 8.

Jurisdiction and leave to appeal

Applicant's submissions

[22] Concerning jurisdiction, the applicant submits that this matter raises several constitutional issues, in particular, the right to fair labour practices in section 23(1) of the Constitution, in that the consequence of the Supreme Court of Appeal's interpretation of section 59(1)(d) of the Defence Act is that the applicant's employment was terminated automatically, without any procedural safeguards or a hearing. In addition to this, the applicant highlights that this section 23(1) constitutional challenge was also raised by him in the High Court.[16]

[23] The applicant also contends that his right to dignity in terms of section 10 of the Constitution is implicated, given that the freedom to engage in productive work is an important component of human dignity. The applicant goes further to argue that the other right that has been impaired is his right to a fair trial in terms of section 35 of the Constitution,[17] in particular his right, in terms of section 35(3)(o) to appeal to a

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[16] The applicant's founding affidavit filed in this Court, at footnote 8, where the applicant states—

> "in para 29 of my founding affidavit in the High Court (which will form part of the record should this Court decide to hear the matter), I stated that, in addition to being unlawful, the termination of my services and failure to reinstate me "*infringes on my right to fair labour practices protected in section 23 of the Constitution*.""

[17] Section 35(3) of the Constitution, which deals with the right to a fair trial, states:

> "Every accused person has a right to a fair trial, which includes the right—
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> (a) to be informed of the charge with sufficient detail to answer it;
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> (b) to have adequate time and facilities to prepare a defence;
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> (c) to a public trial before an ordinary court;
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> (d) to have their trial begin and conclude without unreasonable delay;
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> (e) to be present when being tried;
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> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
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> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
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> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
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> (i) to adduce and challenge evidence;
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> (j) not to be compelled to give self-incriminating evidence;

higher court, in that the consequence of the Supreme Court of Appeal's judgment is that the applicant's original conviction and sentence – which were set aside on appeal – continue to exert residual punitive effects on him.

[24] Alternatively, and in the event this Court concludes that there is no constitutional matter raised, the applicant asserts that this application then falls within the Court's jurisdiction as an arguable point of law of general public importance, which ought to be considered by this Court. In support of this contention the applicant submits that this matter concerns the proper interpretation of the Defence Act and, in particular, the effect of an overturned sentence on a member's employment.

[25] Regarding prospects of success, the applicant contends that he has at least reasonable prospects of success. The applicant further contends that the interpretation of section 59(1)(d) of the Defence Act that was adopted by the Supreme Court of Appeal must be rejected. He submits that the provisions of the Defence Act must be interpreted purposively, furthermore, the said provisions must be interpreted in a manner that best promotes the spirit, purport and objects of the Bill of Rights. The applicant contends that reference to a "sentence to a term of imprisonment" in section 59(1)(d) of the Defence Act must be reference to a *lawful* or *valid* sentence of imprisonment. In this context, so argues the applicant, the trial court's sentence was neither final nor lawful, as a sentence that has been overturned on appeal is not a valid sentence, cannot be relied on, and cannot have legal effect.

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

[26] In conclusion, the applicant avers that in this case, the jurisdictional requirements for section 59(1)(d) of the Defence Act were absent. There was no valid sentence to a term of imprisonment. Where the jurisdictional requirements of section 59(1)(d) are absent, the termination of employment should be reversed by operation of law in other words reinstatement should be automatic. This is because, properly understood, there was no valid termination to begin with.

Respondents' submissions

[27] The respondents submit that the applicant is not challenging the constitutional validity of section 59(1)(d) of the Defence Act and this Court can only declare the section invalid if an application or an appeal is made in that regard.

[28] The respondents further submit that no constitutional issue and arguable point of law of general public importance have been raised in the matter. The respondents, however, concede that the interests of justice favour the hearing of the matter in order to settle the divergent approaches taken by the High Court and the Supreme Court of Appeal to the interpretation of section 59(1)(d).

[29] Regarding the correct interpretation of section 59(1)(d), the respondents argue that a conclusion that the jurisdictional factors in section 59(1)(d) are only met at the time of conclusion of the appeal process, defies the authority and jurisdiction of the court of first instance to convict, impose and enforce its sentences, as the appeal against such conviction and sentence does not suspend its operation pending appeal. The respondents further submit that this approach would render the relevant section nugatory, as it would suspend its operation until the conclusion of a lengthy appeal process.

Condonation

[30] The applicant and respondents have both filed applications for condonation and have not opposed each other's condonation applications. The application for leave to

appeal was filed six court days late. The first respondent's answering affidavit was filed approximately twenty days late. In view of the adequate explanations for the respective delays and the fact that there has been no prejudice caused by the late filing of both the application and the answering affidavit, condonation is granted in both applications.

Jurisdiction

[31] I now consider the preliminary issues, namely, whether this Court has jurisdiction and whether leave to appeal should be granted. This Court's jurisdiction is engaged when a matter raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court.[18] Once this Court's jurisdiction is engaged, the Court must be satisfied that it is in the interests of justice to grant leave to appeal.[19]

[32] The manner in which the provisions of section 59(1)(d) were applied by the SANDF, which was rejected by the High Court but subsequently endorsed by the Supreme Court of Appeal has an impact on the right to appeal to a higher court in section 35(3)(o) of the Constitution. Furthermore, this application raises an arguable point of law of general public importance which ought to be considered by this Court. In *Paulsen*,[20] this Court found that its jurisdiction on the basis of section 167(3)(b)(ii) of the Constitution[21] is established where the matter raises a point of law:

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[18] Section 167(3)(b)(i) and (ii) of the Constitution.

[19] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[20] *Paulsen v Slipknot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[21] Section 167(3)(b)(ii) states:

> "The Constitutional Court—
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> . . .
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> (b) may decide—
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> . . .
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

(a) which "axiomatically, must not be one of fact";[22]

(b) which is arguable, in that there is "some degree of merit in the argument" and has a "measure of plausibility. . . in the sense that there is substance in the argument advanced";[23]

(c) which is of general public importance, in that the point "must transcend the narrow interests of the litigants and implicate the interests of a significant part of the general public";[24] and

(d) which ought to be considered by the Court, and this in effect overlaps with the "factors that are of relevance to the interests of justice factor".[25]

[33] The decision of the Supreme Court of Appeal, which as stated above endorsed the approach adopted by the SANDF, concerns an interpretation of the provisions of section 59(1)(d). The point of law is arguable, given the starkly different interpretations proffered by the High Court and the Supreme Court of Appeal. It will, if left unchallenged, be applicable to all the other members of the SANDF, and will be interpreted as such by all the lower courts. In this respect the application raises an arguable point of law of general public importance which ought to be considered by this Court. The interpretation adopted by the Supreme Court of Appeal is inconsistent with the injunction in section 39(2) of the Constitution.

[34] The contention by the respondents that the applicant raises constitutional issues for the first time in this Court is wrong. In paragraph 29 of his founding affidavit the applicant stated that the interpretation of section 59(1)(d) implicates his right to fair labour practices. Whilst sections 10 and 35 of the Constitution are not expressly mentioned, they are covered by the pleadings. For all these reasons, this Court is clothed with jurisdiction.

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[22] *Paulsen* above n 20 at para 20.

[23] Id at para 21.

[24] Id at para 26.

[25] Id at para 17.

[35] It would also be in the interests of justice to grant leave to appeal, as the applicant has reasonable prospects of success.[26] The rights involved are fundamental and a decision by this Court will provide helpful clarity on an undecided legal question.

Merits

[36] In interpreting legislation, a court must consider section 39(2) of the Constitution which states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[37] In *Hyundai*, this Court held that section 39(2) requires that all legislative provisions must be read "so far as is possible, in conformity with the Constitution".[27] In *Cool Ideas*,[28] this Court restated the approach to statutory interpretation and said:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
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> (a) that statutory provisions should always be interpreted purposively;
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> (b) the relevant statutory provision must be properly contextualised; and
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> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[29]

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[26] *Boesak* above n 19.

[27] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22.

[28] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

[29] Id at para 28.

[38] The parties are in agreement that the purpose of section 59(1)(d) of the Defence Act is to ensure that the SANDF does not have in its ranks, members who have been convicted of serious crimes (and sentenced to imprisonment on this basis). This is in line with section 200(1) of the Constitution, which sets out that the SANDF "must be structured and managed as a disciplined military force".

[39] It is not in dispute between the parties that section 59(1)(d) of the Defence Act operates *ex lege*. The real bone of contention between the parties is whether the jurisdictional requirements stipulated in section 59(1)(d) are conclusively met as soon as a trial court has sentenced a member of the SANDF to a term of imprisonment without the option of a fine, irrespective of his election to exercise his constitutional right to appeal to a superior court as envisaged in section 35(3)(o) of the Constitution – or whether in the event the member has exercised the right to appeal, these jurisdictional requirements are conclusively met only after there is a final pronouncement on the sentence by a competent court. This entails giving true meaning to the reference, in section 59(1)(d) to "*a sentence to a term of imprisonment by a competent civilian court, without the option of a fine*".[30]

[40] As stated above, the respondents have argued for an interpretation that has the effect of terminating the service of the member as soon as the trial court has imposed sentence, irrespective of the election by the member to appeal against the order of the trial court. The applicant on the other hand has asked the Court to adopt the contrary meaning. The problem with the interpretation advanced by the respondents is that it does not factor in the hierarchical functioning structure of our courts. If this Court were to adopt it, it would be tantamount to saying that any appeal processes and any subsequent decisions by the superior courts are of no moment. This interpretation would be at variance with the provisions of section 35(3)(o) of the Constitution. If the SANDF is allowed to stick to its initial stance, which was based on an erroneous decision of the trial court, irrespective of the decision of the superior court setting the

[30] Defence Act above n 1.

earlier decision aside, this would have the effect of excusing the SANDF from the obligation to comply with the binding orders of appellate courts.

[41] The words "conviction" and "sentence" in section 59(1)(d) of the Defence Act must thus be interpreted to refer to valid and final convictions and sentences, where there is an appeal. Once the decision of the trial court was set aside, there was no longer any lawful conviction nor sentence and the jurisdictional factors set out in section 59(1)(d) of the Defence Act fall away or are, as a result, absent. The member would no longer have a criminal record and no purpose would be served by continuing to subject such a member to the penal provisions of the section.

[42] The effect of a conviction and sentence being overturned is distinguishable from a pardon, in that once the conviction and sentence have been set aside, the fact of the conviction and sentence are wiped out. They are treated as never having occurred. On the other hand, a pardon, as this Court said in *McBride,*[31] does not confer on the perpetrator immunity from untrammelled discussion of the deeds that led to his/her conviction and from the moral opprobrium that some continue to attach to those deeds.[32] Importantly, a pardon does not render untrue the fact that the perpetrator was convicted, or expunge the deed that led to his or her conviction.[33] Those remain historically true.[34]

[43] In *Du Toit*,[35] Langa CJ writing for a unanimous court held that the effect of granting amnesty on civil liability that has already been determined is, "prospective only". This, the Court reasoned, shows that "the granting of amnesty does not

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[31] *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*).

[32] Id at paras 64-5.

[33] Id at para 72.

[34] Id.

[35] *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC).

obliterate all direct legal consequences of conduct in respect of which amnesty is granted”.[36]

[44] In *Masemola,*[37] this Court distinguished the facts between *Masemola* and *Du Toit* and held:

> “Here, the applicant is not seeking expungement of his disqualification, he seeks only its expungement from the date of his presidential pardon. If the applicant had sought, retroactively, on the basis of his pardon, to have his disqualification expunged from the date of his conviction to April 2001, his case would have been on all fours with that of *Du Toit*.
>
> But he does not seek that. The applicant only seeks the reinstatement of his special pension from the date that he was pardoned. Therefore, in true fidelity to the reasoning and importance of *Du Toit*, he seeks a retrospective but not retroactive result. Differently put, he acknowledges that he was disqualified from receiving his special pension under the Act between April 2001 and his pardon in July 2011. But, he says, his entitlement to the special pension revived when he was pardoned.”[38]

[45] It follows that once the applicant’s appeal was successful, there was no longer any connection between the purpose for which section 59(1)(d) was enacted and the application of the provision to him. When the jurisdictional factors of section 59(1)(d) fell away, the termination of employment was reversed by operation of law. This is because, properly understood, in the absence of a valid conviction and sentence, in the form of a final order confirming the order of the trial court, there was no valid termination of his employment. As the jurisdictional factors for the operation of section 59(1)(d) are absent, the applicant’s employment was never validly terminated.

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[36] Id at para 44.

[37] *Masemola v Special Pensions Appeal Board* [2019] ZACC 39; 2020 (2) SA 1 (CC); 2019 (12) BCLR 1520 (CC).

[38] Id at paras 38-9.

[46] I am fortified in this conclusion by this Court's reasoning in *Steenkamp*,[39] where it clarified the distinction between unlawful, unfair and invalid dismissals. The Court stated:

> "The common law which gives us the concept of the invalidity of a dismissal is rigid. It says that if a dismissal is unlawful and invalid, the employee is treated as never having been dismissed irrespective of whether the only problem with the dismissal was some minor procedural non-compliance. It says that in such a case the employer must pay the employee the whole back-pay, even if, substantively, the employer had a good and fair reason to dismiss the employee."[40]

It stated further:

> "The distinction between an invalid dismissal and an unfair dismissal highlights the distinction in our law between lawfulness and fairness in general and, in particular, the distinction between an unlawful and invalid dismissal and an unfair dismissal or, under the 1956 Labour Relations Act a dismissal that constituted an unfair labour practice. At common law the termination of a contract of employment on notice is lawful but that termination may be unfair under the Labour Relations Act if there is no fair reason for it or if there was no compliance with a fair procedure before it was effected. This distinction has been highlighted in both our case law and in academic writings.
>
> It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties. However, it cannot order the reinstatement of the employee."[41]

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[39] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC).

[40] Id at para 118.

[41] Id at paras 191-2.

Once the charges on which the applicant was initially convicted and sentenced were set aside on appeal, the applicant should have been treated as never having been convicted nor sentenced.

[47] This Court has on occasion dealt with termination of employment for failure to meet jurisdictional factors. In *Grootboom*,[42] Mr Grootboom was employed by the National Prosecuting Authority (NPA) as a public prosecutor.[43] He was suspended from work and while so suspended, left South Africa to study in the United Kingdom.[44]

[48] The NPA then informed him that he had been discharged from his duties from public service in terms of section 17(5)(a)(i) of the Public Service Act,[45] which provides for the deemed discharge of public servants who absent themselves from their official duties for longer than one month without their employers' permission. The Labour Court and the Labour Appeal Court refused to set aside Mr Grootboom's deemed discharged.[46] On appeal to this Court he was successful.[47]

[49] This Court held that Mr Grootboom had been barred from performing any of his duties or being present at work.[48] As a result, so the Court continued, he could not be said to have absented himself from his duties without his employer's permission.[49] The Court concluded that the central jurisdictional factor for the relevant provision was absent, and that given this absence, section 17(5)(a)(i) of the Public Service Act,[50]

[42] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC).

[43] Id at para 4.

[44] Id at para 9.

[45] 103 of 1994.

[46] *Grootboom* above n 42 at para 12-4.

[47] Id at para 38.

[48] Id at para 43.

[49] Id at para 45.

[50] Public Services Act above n 45.

was not applicable and Mr Grootboom had remained in the employ of the NPA.[51] There was thus no question whether Mr Grootboom was required to apply for reinstatement or re-employment. As was the case in *Grootboom*, there was no need for Mr Maswanganyi to apply for reinstatement or re-employment.

Conclusion

[50] It follows that the application for leave to appeal succeeds and the appeal must be upheld.

Order

[51] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel, where so employed.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "(a) It is declared that the applicant's service with the South African National Defence Force did not terminate as contemplated in section 59(1)(d) of the Defence Act 42 of 2002 and that he continues to be in the employ of the South African National Defence Force in the same position and capacity he was on 18 July 2014.

   (b) The respondents are ordered to pay the applicant's costs in the High Court, and Supreme Court of Appeal, jointly and severally."

[51] *Grootboom* above n 42 at para 42.

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